

OHIO BOARD OF PROFESSIONAL CONDUCT

OPINION 2016-12

Issued December 9, 2016

Conflict of Interest when Spouse of Criminal Defendant's Lawyer is an Officer Employed by Arresting or Investigating Agency

Syllabus of Opinion:

A lawyer is not prohibited from accepting representation of a defendant in a criminal matter where the lawyer's spouse is an officer or detective employed with the arresting or investigating agency and is not involved in the case. If a lawyer determines that a material limitation conflict exists and the lawyer seeks to accept or continue the representation, then the lawyer must ensure that (1) he or she is able to provide competent and diligent representation to the client; (2) the client gives informed consent, confirmed in writing; and 3) the representation is not precluded by law. Prof.Cond.R. 1.7(a)(2), (b), (c).

If a lawyer determines that the representation cannot be accepted or continued due to the material limitation conflict, then that conflict generally is not imputed to other lawyers in the firm or the public office under Prof.Cond.R. 1.10(a).

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

OHIO BOARD OF PROFESSIONAL CONDUCT

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SYLLABUS: A lawyer is not prohibited from accepting representation of a defendant in a criminal matter where the lawyer's spouse is an officer or detective employed with the arresting or investigating agency and is not involved in the case. If a lawyer determines that a material limitation conflict exists and the lawyer seeks to accept or continue the representation, then the lawyer must ensure that (1) he or she is able to provide competent and diligent representation to the client; (2) the client gives informed consent, confirmed in writing; and 3) the representation is not precluded by law. Prof.Cond.R. 1.7(a)(2), (b), (c).

If a lawyer determines that the representation cannot be accepted or continued due to the material limitation conflict, then that conflict generally is not imputed to other lawyers in the firm or the public office under Prof.Cond.R. 1.10(a).

QUESTION: A lawyer seeks guidance regarding whether she may accept or continue to represent criminal defense clients when the spouse of the lawyer is an officer or detective, employed by the agency that arrested or investigated the client, but the spouse is not involved in the case.

APPLICABLE RULES: Prof.Cond.R. 1.7, 1.10.

OPINION: A lawyer must determine whether a conflict of interest exists under the Rules of Professional Conduct in order to accept or to continue to represent a defendant in a

criminal matter when the lawyer's spouse is an officer or detective employed with the arresting or investigating agency, but is not involved in the case.

Under Prof.Cond.R. 1.7(a), a conflict of interest is created if the lawyer's representation of the current client "will be directly adverse to another current client." Prof.Cond.R. 1.7(a)(1). A conflict of interest also is created even when clients are not directly adverse, but where "there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities for another client, a former client, or a third person or by the lawyer's own personal interests." Prof.Cond.R. 1.7(a)(2).

The mere possibility of subsequent harm from a potential material limitation conflict, by itself, does not require disclosure and consent. Prof.Cond.R. 1.7, cmt. [14]. The critical questions a lawyer must evaluate are: (1) whether a difference in interests between the client and the lawyer is likely to arise; and (2) if so, whether the difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Prof.Cond.R. 1.7, cmt. [14]. The rationale for this rule is that a lawyer's own interests should not adversely affect the representation of the client. Prof.Cond.R. 1.7, cmt. [20].

ANALYSIS:

Material Limitation Conflict:

Analyzing these rules in relation to the question presented, the lawyer must determine whether a material limitation conflict exists under Prof.Cond.R. 1.7(a)(2), which would preclude the lawyer from accepting or continuing representation of a defendant. Among the relevant considerations are whether the lawyer will be able to conduct a direct or cross examination of his or her spouse's coworkers or superiors or whether the lawyer's duty of loyalty to the client is compromised by his or her spousal relationship.

If the lawyer, in the exercise of his or her professional judgment, determines there is no material limitation conflict, the Rules of Professional Conduct permit a representation to continue or be accepted. If the lawyer believes a material limitation conflict exists, the Rules of Professional conduct permit the lawyer to accept or continue representation if (1) the lawyer is able to provide competent and diligent representation to the client, (2) the client gives informed consent, confirmed in writing, and (3) the representation is not otherwise prohibited by law and does not involve the assertion of a claim by one client against another in the same proceeding. Prof. Cond. R. 1.7(b)(1)-(3).

Although the Rules of Professional Conduct permit a lawyer to accept or continue representation when faced with a material limitation conflict, the Board recommends that this type of representation be avoided when possible due to the complicated circumstances that may prevent the competent and diligent representation of the client when a lawyer is faced with the type of conflicting professional and personal obligations presented in this opinion.

Imputation of Conflict:

If a lawyer determines that a representation cannot be undertaken or continued due to a material limitation conflict, then that conflict generally is not imputed to the other lawyers in the lawyer's firm or public office. Prof.Cond.R. 1.10(a) states that when a conflict of interest is based upon a personal interest and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, then there is no imputation of that conflict by other lawyers in the firm.

CONCLUSION: When a lawyer is criminal defense counsel and the lawyer's spouse is an officer or detective employed with the arresting or investigating agency in the case, a material limitation conflict may exist between the lawyer's representation of the client and the lawyer's spouse, even if the spouse is not involved in the matter. If a material limitation conflict exists and the lawyer seeks to accept or continue the representation, then under Prof.Cond.R. 1.7 the lawyer may represent the client only if (1) competent and diligent representation is provided to the client; (2) the client gives informed consent, confirmed in writing; and (3) the representation is not prohibited by law or does not involve the assertion of a claim by one client against the other in the same proceeding.

Prof.Cond.R. 1.7(b)(1-3), 1.7(c). If a lawyer determines a material limitation conflict exists and cannot accept or continue the representation, then such a conflict ordinarily is not imputed to the lawyer's law firm.